No. 79-552

In the Supreme Court of the United States

OCTOBER TERM, 1979

MITSUI & CO., LTD., ET AL., PETITIONERS

v.

INDUSTRIAL INVESTMENT DEVELOPMENT CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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CITATIONS

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This brief is filed in response to the Court's invitation of November 26, 1979.

QUESTION PRESENTED

Whether the act of state doctrine precludes courts of the United States from inquiring into the purpose or intent of actions of a foreign sovereign to ascertain damages resulting from federal antitrust

violations when there is no challenge to the legality or validity of the foreign sovereign's actions.

STATEMENT

1. Pursuant to Section 4 of the Clayton Act, 15 U.S.C. 15, respondents sought treble damages from petitioners for alleged violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. 1 and 2, and Section 73 of the Wilson Tariff Act, 15 U.S.C. 8. The litigation resulted from unsuccessful efforts by respondents to enter the logging and lumber business in Indonesia. That country's Foreign Capital Investment Act restricts the business opportunities of foreign private entrepreneurs (Pet. App. 3a). It requires a foreign company, as a precondition to conducting business in Indonesia, to establish a joint venture company with a local business partner (*ibid.*). Known as "P.T.'s," these joint venture enterprises must obtain the approval of the Indonesian government before commencing operations (*ibid.*).

The Foreign Capital Investment Act also regulates the exploitation of state-controlled lands. An approved P.T. cannot harvest timber from such lands until it receives a concession and cutting license from Indonesia's Department of Forestry (*ibid.*). The procedure for obtaining the license requires preliminary surveys and negotiations between the applicant and the Director General of Forestry, resulting in tentative concession rights incorporated in a Forestry Agreement (*ibid.*). The Agreement, accompanied by

an Application Letter from the P.T., must then be submitted to the Minister of Agriculture (Pet. App. 3a-4a). If the application is approved and a concession fee paid, the Director General of Forestry issues a formal concession and a license that authorize logging operations consistent with the Forestry Agreement (*id.* at 4a).

In 1970, respondent Industrial Investment signed a joint venture agreement with Telaga Mas, an Indonesian company, to harvest logs from Telaga Mas' timber concession in a government-owned forest (*ibid.*). During the first half of 1971, the joint venture partners negotiated with the Indonesian government to obtain approval for the proposed logging business. The negotiations resulted in a Forestry Agreement signed by Industrial Investment, Telaga Mas, and the Director General of Forestry (*ibid.*). The Department of Forestry was empowered to cancel the Agreement if the joint venture companies failed to cooperate or fulfill their obligations (Pet. App. 5a). The Agreement also provided that cancellation of the joint venture arrangement prior to the issuance of the license certificate would automatically terminate any rights of the parties to engage in lumbering operations (*ibid.*).

Respondents' complaint alleged that the Mitsui petitioners infiltrated and usurped control of Telaga Mas in order to eliminate competition by destroying respondents' interest in the prospective logging concession (*ibid.*). Conspiratorial acts by petitioners allegedly resulted in Mitsui's affiliates obtaining con-

trol of Telaga Mas and also led to the annulment of the joint venture agreement with respondents (Pet. App. 5a-6a). Advised of the annulment, the Director General of Forestry informed respondents and Telaga Mas that their tripartite Forestry Agreement was cancelled and invalid, but invited the parties to reapply if they could overcome their disagreement (*id.* at 6a). The theory of respondents' antitrust complaint was that frustration of the joint venture by petitioners caused the cancellation of the Forestry Agreement which in turn caused the Indonesian government to deny the logging concession (*ibid.*). Respondents sought recovery of damages for the destruction of this commercial opportunity.

2. The district court granted summary judgment for petitioners, relying on the act of state doctrine (Pet. App. 18a-24a).[1] The business injury for which respondents sought redress, the district court concluded, was ultimately caused by the Indonesian government's failure to grant a cutting license to harvest logs (*id.* at 21a). The act of state doctrine, it maintained, foreclosed judicial inquiry into the "motivation" behind that failure (*ibid.*). Accordingly, the district court held that the doctrine precluded any

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[1] Petitioners also moved to dismiss the complaint on four other grounds: (1) lack of standing; (2) insufficient connection with American commerce or interests to justify application of the antitrust laws; (3) failure of respondents to fall within the "target area" protected by the antitrust laws; and (4) forum non conveniens (Pet. App. 18a-19a). Neither the district court nor the court of appeals considered the merits of these defenses, and they are not before this Court.

evidence that might be tendered by respondents to show that the alleged antitrust conspiracy was the cause of Indonesia's denial of the timber concession (*id.* at 23a).[2]

A divided panel of the court of appeals reversed and remanded (Pet. App. 1a-17a). The court explained that this Court's decisions in *United States* v. *Sisal Sales Corp.*, 274 U.S. 268 (1927), and *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962), declined to immunize antitrust conspiracies simply because their success was partially attributable to the procurement of foreign legislation or other action by foreign officials (Pet. App. 9a-11a). Adjudication of the antitrust claims of respondents, the court noted, would not require an inquiry into the propriety or validity of Indonesia's failure to issue a cutting license (*id.* at 11a-13a). Indonesia's actions were relevant only to the measurement of damages resulting from the alleged conspiracy (*id.* at 13a-14a). Insofar as this inquiry might extend to the motivation of the Indonesian government, the court concluded, neither the act of state doctrine nor its policies would be infringed (*id.* at 14a-17a). In so holding, the court of appeals expressly rejected the position of the Second Circuit in *Hunt* v. *Mobil Oil Corp.*, 550 F.2d 68, cert.

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[2] The district court also concluded that denial of the timber concession did not fall within the "commercial act" exception to the act of state doctrine as expounded in *Alfred Dunhill of London* v. *Republic of Cuba*, 425 U.S. 682 (1976) (Pet. App. 23a-24a). The court of appeals did not address that issue (*id.* at 9a).

denied, 434 U.S. 984 (1977), which held that inquiry into the motivation of foreign government actions inevitably calls into question the validity of those actions and thus is impermissible under the act of state doctrine (*id.* at 15a-16a).

INTRODUCTION AND SUMMARY

We believe that the court of appeals' decision is correct, but nonetheless urge that the petition for a writ of certiorari be granted. The decision raises important questions concerning the breadth of the act of state doctrine generally and its application to the antitrust laws in particular that have produced conflicts among the lower federal courts. The growing importance of international trade and investment to the Nation's economy and the participation of foreign governments in those transactions underscore the need for a clear and authoritative exposition of the act of state doctrine.

The decisions in *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, *supra*, *United States* v. *Sisal Sales Corp.*, *supra*, and *American Banana Co.* v. *United Fruit Co.*, 213 U.S. 347 (1909), have created uncertainty whether the act of state doctrine forecloses antitrust plaintiffs from inquiring into the purpose behind a foreign government's official acts.[3] In this case, a divided panel of the

[3] We submit that a distinction should be drawn between the validity of action by a foreign government and the purposes behind that action. The use of the word "motive" by lower federal courts, as opposed to purpose, to make this dis-

Fifth Circuit viewed the doctrine as limited to precluding inquiry into the validity of foreign sovereign action. The court of appeals expressly disagreed with the decision of the Second Circuit in *Hunt* v. *Mobil Oil Corp.*, *supra*, which embraced a more sweeping definition of the act of state doctrine that would foreclose judicial inquiry into the reasons that prompted foreign government action even though the validity of that action was not questioned. The decisions of the Ninth Circuit also differ over whether the act of state doctrine bars judicial inquiry into the purpose underlying the official acts of foreign governments.[4]

We submit that while judicial examination of purpose may on occasion implicate some of the concerns underlying the act of state doctrine, that doctrine only precludes judicial questioning of the validity or legality of foreign government actions. In the present case, respondents' antitrust claims can be substantiated, if valid, and recoverable damages

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tinction confuses the act of state analysis. As this Court has acknowledged, searching for the "motive" of government action, ordinarily resulting from the interaction of several persons and institutions, is elusive at best and raises the conceptual problem of choosing among the varied subjective motivations of the participating officials. See, *e.g.*, *United States* v. *O'Brien*, 391 U.S. 367, 383-384 (1968).

[4] Compare *Occidental Petroleum Corp.* v. *Buttes Gas & Oil Co.*, 331 F. Supp. 92, 110 (C.D. Cal. 1971), aff'd, 461 F.2d 1261 (9th Cir.), cert. denied, 409 U.S. 950 (1972), with *Timberlane Lumber Co.* v. *Bank of America, N.T. & S.A.*, 549 F.2d 597, 605-608 (9th Cir. 1977).

fully measured, without questioning the validity or legality of the Indonesian government's actions.[5]

DISCUSSION

1. The importance of international trade and investment to the Nation's economic vitality has increased substantially in the last decade. In fiscal year 1978, the United States exported approximately $220 billion and imported approximately $230 billion worth of goods and services, which in the aggregate constituted approximately 20% of the Nation's Gross National Product.[6] At present, United States firms have direct investments abroad valued at approximately $170 billion. Foreign governments and state enterprises are every-day participants in these international dealings. See H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. 7 (1976), prepared in connection with Congress' consideration of the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. 1602, *et seq.*

An essential catalyst to international commercial transactions is an orderly and predictable body of

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[5] We express no view on respondents' ability to prove their antitrust claims or alleged damages at trial or on any factual or other legal defenses petitioners might raise. The absence of record evidence precludes evaluation of such issues at this time. In any event, as this Court has often stated in antitrust cases, "dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly." *Hospital Building Co.* v. *Trustees of Rex Hospital*, 425 U.S. 738, 746 (1976); *McLain* v. *Real Estate Board of New Orleans*, No. 78-1501 (Jan. 8, 1980), slip op. 13.

[6] *1979 Economic Report of the President*, Table B-1.

legal principles to govern potential disputes. See *The Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1, 12-15 (1972); *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 433-434 (1964). Uncertainty regarding the doctrine of foreign sovereign immunity, bottomed on the same policies as the act of state doctrine (see *First National City Bank* v. *Banco Nacional de Cuba*, 406 U.S. 759, 762-763 (1972)), prompted cooperative efforts by Congress and the executive branch to codify the scope of immunity accorded to foreign sovereigns in the Foreign Sovereign Immunities Act of 1976. See H.R. Rep. No. 94-1487, *supra*, at 6, 8-9. The corrective purposes of that Act will be partially undermined, however, if judicial conflicts persist regarding the cognate act of state doctrine.

2. In its most recent pronouncements, this Court has noted that the act of state doctrine "precludes the courts of this country from inquiring into the *validity* of the public acts [of] a recognized foreign sovereign power committed within its own territory." *Banco Nacional de Cuba* v. *Sabbatino*, *supra*, 376 U.S. at 401 (emphasis supplied). See also *Alfred Dunhill of London* v. *Republic of Cuba*, 425 U.S. 682, 697 (1976) (plurality opinion of Mr. Justice White); *First National City Bank* v. *Banco Nacional de Cuba*, *supra*, 406 U.S. at 767 (plurality opinion of Mr. Justice Rehnquist).[7] The Court has justified this self-

[7] See also *Restatement (Second) of Foreign Relations Law of the United States* § 41 (1965): "[A] court in the United States * * * will refrain from examining the *validity* of an act of a foreign state by which that state has exercised its jurisdiction to give effect to its public interests" (emphasis supplied).

imposed doctrine of judicial abstention (see *First National City Bank* v. *Banco Nacional de Cuba, supra,* 406 U.S. at 763 (plurality opinion)) on two grounds: (1) the absence of settled or ascertainable legal standards by which the validity of a foreign state's public acts may be measured; and (2) the risk that a judicial declaration of the validity or invalidity of the acts of a foreign state may conflict with the positions of the political branches and thus interfere with or embarrass the conduct of foreign relations by those branches. See *Banco Nacional de Cuba* v. *Sabbatino, supra,* 376 U.S. at 423, 428-430; *First National City Bank* v. *Banco Nacional de Cuba, supra,* 406 U.S. at 765-768 (plurality opinion).

Even when such considerations are present, however, they do not always preclude adjudication of a case. Because the act of state doctrine rests on principles of judicial abstention rather than on jurisdictional or constitutional grounds, it constitutes a limited exception to the ordinary obligation of courts to adjudicate cases and controversies over which they have jurisdiction. See *First National City Bank* v. *Banco Nacional de Cuba, supra,* 406 U.S. at 763 (plurality opinion). This Court therefore has concluded that the doctrine should be applied in a flexible fashion, in recognition of the fact that the capacity of courts to resolve certain issues and the risk of embarrassment or interference with the conduct of foreign relations vary according to the issues and circumstances presented in each case. See *Banco Nacional de Cuba* v. *Sabbatino, supra,* 376 U.S. at

428; *First National City Bank* v. *Banco Nacional de Cuba, supra,* 406 U.S. at 763 (plurality opinion). Moreover, Congress, in limiting the scope of the *Sabbatino* decision, has indicated a preference for a narrow application of the act of state doctrine. See 22 U.S.C. 2370(e)(2).

It is possible (though we deem it unlikely on the apparent facts of the present case) that judicial inquiry into the purpose behind the Indonesian government's act of withdrawing approval of the joint venture agreement would have the potential to embarrass that government and to affect our government's conduct of foreign relations. However, while the existence of potential embarrassment requires caution, it does not, standing alone, compel an application of the act of state doctrine or otherwise require the courts to abstain from adjudicating a dispute.

None of this Court's decisions suggest that the act of state doctrine precludes all judicial inquiries that may embarrass a foreign state or affect the political branches' conduct of foreign relations. Rather, the act of state doctrine is based on the need to avoid unprincipled decisions resulting from the absence of legal standards, and the unique embarrassment, and the particular interference with the conduct of foreign affairs, that may result from the judicial determination that a foreign sovereign's acts are invalid. Judicial inquiry into the purpose of a foreign sovereign's acts would not require a court to rule on the legality of those acts, and a finding concerning pur-

pose would not entail the particular kind of harm that the act of state doctrine is designed to avoid. Dismissal of a complaint before the development of evidence, merely because adjudication raises the bare possibility of embarrassment, constitutes an unwarranted expansion of the act of state doctrine and is contrary to the flexibility with which that doctrine should be applied.[8]

3. This Court's more recent decisions in the antitrust context decline to apply the act of state doctrine when the validity of a foreign sovereign's conduct is not called into question.[9] In *United States* v. *Sisal Sales Corp.*, *supra*, the Court upheld a complaint that alleged that the defendants had conspired to monopolize and restrain trade by, *inter alia*, securing favorable legislation in Mexico. Following *Sisal Sales*, the Court in *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, *supra*, upheld an antitrust complaint

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[8] A complaint that requires proof of the purpose underlying a foreign government's act may raise substantial problems of proof. See Pet. App. 19a; cf. Fed. R. Civ. P. 44.1. But the possibility of such problems is not a sufficient reason to prevent the plaintiff from attempting to present competent evidence. As this Court noted in *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, *supra*, 370 U.S. at 697, 700-701, the jury may be permitted to draw appropriate inferences concerning causation from circumstantial evidence.

[9] The political question doctrine, however, might justify judicial abstention in cases that could cause intense embarrassment to a foreign state or improperly inject the courts into the formulation or execution of the Nation's foreign policy. See *Baker* v. *Carr*, 369 U.S. 186, 211-213, 217 (1962); *Goldwater* v. *Carter*, No. 79-856 (Dec. 13, 1979) (plurality opinion of Justice Rehnquist).

that alleged that the defendants had conspired to establish an exclusionary customer allocation program for sales of vanadium in Canada that had been instituted and controlled by an agent of the Canadian government. The Court stated (370 U.S. at 706):

> What the petitioners here contend is that the respondents are liable for actions which they themselves jointly took, as part of their unlawful conspiracy, to influence or to direct the elimination of Continental [Ore] from the Canadian market. As in *Sisal*, * * * respondents are not insulated by the fact that their conspiracy involved some acts by the agent of a foreign government.

The holdings in *Sisal Sales* and *Continental Ore*, however, seem irreconcilable with Mr. Justice Holmes' early exposition of the act of state doctrine in *American Banana Co.* v. *United Fruit Co.*, *supra*. There, the Court upheld the dismissal of an antitrust complaint that alleged that the defendant had caused the government of Costa Rica to seize the plaintiff's property for the purpose of eliminating it as a competitor. The Court held that the antitrust laws do not reach conduct occurring outside the United States (213 U.S. at 357), a holding that has been rejected by subsequent decisions of this Court. See *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, *supra*, 370 U.S. at 704. Justice Holmes further supported the Court's decision by reliance on act of state principles (213 U.S. at 358):

> [I]t is a contradiction in terms to say that within its jurisdiction it is unlawful to persuade a sovereign power to bring about a result that it declares by its conduct to be desirable and proper. It does not, and foreign courts cannot, admit that the influences were improper or the results bad. It makes the persuasion lawful by its own act.

This broad reasoning would insulate from judicial scrutiny anticompetitive schemes that are effectuated by procuring a foreign sovereign act even though the case may be resolved under the antitrust laws without questioning the validity of the act under international law or otherwise. To this extent, the reasoning has not survived the decisions in *Sisal Sales* and *Continental Ore*, and extends beyond the ambit of the act of state doctrine as expounded in *Banco Nacional de Cuba* v. *Sabbatino*, *supra*; *Alfred Dunhill of London* v. *Republic of Cuba*, *supra*; and *First National City Bank* v. *Banco Nacional de Cuba*, *supra*. Nevertheless, this Court never has explicitly so stated, and *American Banana* was cited in *Banco Nacional de Cuba* v. *Sabbatino*, *supra*, 376 U.S. at 416, as a case "directly or peripherally" involving the act of state doctrine.

4. The apparent inconsistency between *American Banana* and subsequent decisions of this Court has engendered conflicts and uncertainty among the lower courts. In *Hunt* v. *Mobil Oil Corp.*, 410 F. Supp. 10 (S.D.N.Y. 1976), the plaintiff alleged that the defendants (producers of crude oil in Libya) had manipulated oil negotiations with the Libyan government and

pursued a course of action that caused Libya to nationalize the property of plaintiffs and terminate their production of Libyan crude oil. The district court dismissed their antitrust complaint, reasoning that adjudication of the dispute "would require inquiry into acts and conduct of Libyan officials, Libyan affairs and Libyan policies," and that such an inquiry is precluded by the act of state doctrine. 410 F. Supp. at 24. A divided panel of the Second Circuit affirmed. It noted that resolution of the antitrust claims would necessitate an inquiry into the motives for the Libyan government's expropriation, and insisted that inquiry into the "motivation of the Libyan action * * * inevitably involves its validity" (550 F.2d 68, 77). As Judge Van Graafeiland correctly pointed out in dissent, however, the plaintiff's injury could have been established by proof that the expropriation of their property was caused by the alleged anticompetitive conduct without passing judgment on whether the expropriation was valid. 550 F.2d at 80. See also Brief for the United States as Amicus Curiae in *Hunt* v. *Mobil Oil,* No. 76-1403, at 11. The majority in *Hunt* reasoned that the act of state doctrine shields from judicial scrutiny all private misconduct that inflicts injury by causing official action of a foreign government, since proof of the requisite causal link between the damage and the violation requires an examination of the purpose of such official action (550 F.2d at 77-79).

This interpretation clashes with that of the Fifth Circuit panel in this case. Here, a 2-1 majority dis-

agreed with the Second Circuit's view "that motivation and validity are equally protected by the act of state rubric" (Pet. App. 16a). Holding that the act of state doctrine does not foreclose inquiry into a foreign government's purpose when relevant to the measurement of antitrust damages, the majority explained (*id.* at 16a-17a):

> Precluding all inquiry into the motivation behind or circumstances surrounding the sovereign act would uselessly thwart legitimate American goals where adjudication would result in no embarrassment to executive department action.

The issue whether the act of state doctrine forecloses judicial examination of the purpose underlying official acts of foreign governments has also produced disparate approaches within the Ninth Circuit. In *Occidental Petroleum Corp.* v. *Buttes Gas & Oil Co.*, 461 F.2d 1261 (9th Cir. 1972), the court, relying on *American Banana*, expressed an unwillingness to make any inquiry into the motivation underlying foreign sovereign action.[10] In *Timberlane Lumber Co.* v. *Bank of America, N.T. & S.A.*, 549 F.2d 597 (9th Cir. 1977), however, the court declined to find that the act of state doctrine barred a complaint that alleged, *inter alia*, that the defendants had used Honduran judicial process for anticompetitive purposes to injure the plaintiff.

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[10] The controversy in the *Occidental Petroleum* case subsequently arose in the courts of the United Kingdom. The judges of the Court of Appeal, Civil Division, came to a conclusion contrary to that of the Ninth Circuit concerning the application of the act of state doctrine. See *Buttes Gas and Oil Co.* v. *Hammer*, [1975] 2 All E.R. 51.

In sum, this case warrants review to clarify the act of state doctrine and to dispel the conflict among the lower federal courts as to whether the purpose underlying the official acts of foreign governments can be judicially ascertained when the validity of those acts is not questioned.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JANUARY 1980

☆ U. S. GOVERNMENT PRINTING OFFICE: 1980 309613 212